150 US 209

150 US 209

RECORD, CASE NO. 15100.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~1130.~~ 785

DANIEL J. McDAID, WILLIAM H. MERRIWEATHER, AND JOHN H. SHANKLIN, PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA ON THE RELATION OF WINFIELD S. SMITH AND STEPHEN H. BRADLEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED AUGUST 10, 1892.

RECORD, CASE NO. 15100.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., 1130.

DANIEL J. McDAID, WILLIAM H. MERRIWEATHER, AND JOHN H. SHANKLIN, PLAINTIFFS IN ERROR,

vs.

THE TERRITORY OF OKLAHOMA ON THE RELATION OF WINFIELD S. SMITH AND STEPHEN H. BRADLEY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court	2	1
Complaint	2	1
Answer	10	5
Demurrer to answer	14	7
Judgment	14	7
Clerk's certificate	16	8
Assignment of errors	17	8
Citation and service	18	9
Notice of appeal	19	9
Order for supersedeas	20	10
Order to advance, etc	21	10
Argument and submission	21	10
Judgment	22	10
Opinion of the court	23	11
Dissenting opinion of Clark, J	38	19
Order granting writ of error, etc	50	25
Writ of error	52	25
Citation	54	26
Affidavit of value	55	26
Order extending time to file writ of error	57	27
Assignment of errors	58	27
Clerk's certificate	61	28

1 IN THE SUPREME COURT.

UNITED STATES OF AMERICA,
Territory of Oklahoma:

Be it remembered that heretofore, on the 10th day of August, 1891, the plaintiffs in error, by Horace Speed, their attorney, filed in the office of the clerk of the supreme court of the Territory of Oklahoma the transcript of the record and other papers in the case of the Territory of Oklahoma on the relation of Winfield S. Smith and Stephen H. Bradley vs. Daniel J. McDaid, William H. Merriweather, and John H. Shanklin, defendants, viz:

2 Pleas and proceedings before the honorable E. B. Green, judge of the district court of the first judicial district of Logan County, Oklahoma Territory, at a term of said court held at the court-house in the city of Guthrie, Logan County, Oklahoma Territory, commenced on the 1st day of March, A. D. 1891.

In the district court, March term, A. D. 1891.

TERRITORY OF OKLAHOMA,
Logan County:

TERRITORY OF OKLAHOMA ON THE RELATION of Winfield S. Smith and Stephen H. Bradley, plaintiff,
vs.
DANIEL J. MCDAID, WILLIAM H. MERRIweather, and John H. Shanklin, defendants.

Be it remembered that on the 27th day of April, A. D. 1891, the said plaintiff, by its attorney, Harper S. Cunningham, esquire, filed in the office of the clerk of said court the following complaint in this case, to wit:

In the district court of Logan County and Territory of Oklahoma.

THE TERRITORY OF OKLAHOMA ON RELATION of Winfield S. Smith and Stephen H. Bradley, petitioners,
versus
DANIEL J. MCDAID, JOHN H. SHANKLIN, William H. Merriweather, respondents.

Action for writ of mandate.

Come now the above-named relators, Winfield S. Smith and Stephen H. Bradley, and for cause of action against said respondents, Daniel J. McDaid, William H. Merriweather, and John H. Shanklin, trustees for the town site of Guthrie, Logan County, Oklahoma Territory, complain and

3 say, each for himself, that he is a native born citizen of the United States and the head of a family; that he is now and has ever been

since April 22nd, 1889, legally qualified to acquire title to town lots within the said town site of Guthrie, Logan County, Oklahoma Territory. That by act of Congress, approved March 2nd, 1889, and the President's proclamation in pursuance thereof, promulgated March 23rd, 1889, the area of land now known as Oklahoma Territory was opened to settlement at and after 12 o'clock noon, April 22nd, 1889; and by the terms of said act provision was made for the occupancy of said area as homesteads under the homestead laws of the United States and as town sites under sections 2387 and 2388 of the Revised Statutes of the United States, except as limited by said act.

That in pursuance thereof, on the afternoon of April 22nd, 1889, sections 8 and 9, in township 16 north, of range 2 west of the Indian meridian, in the Indian Territory (now Oklahoma Territory) were settled upon and occupied for purposes of residence, trade, and business as town sites; that on said afternoon of April 22nd, 1889, these relators, Winfield S. Smith and Stephen H. Bradley, entered upon and occupied for the purpose of residence, trade, and business a parcel of land being then public domain and unoccupied and unappropriated, lying in the east one-half of section 8, in township 16 north, of range 2 west of the Indian meridian in the Indian Territory, now known as lots 4 and 5, in block 56, of the town site of Guthrie and Logan County, Oklahoma Territory; that on said afternoon the relators established an actual residence upon said parcel of land and began the practice of law thereon and erected offices thereon, and continued to occupy the same for residence and business, and have never since parted with their interest in or right to the pos-
4 session and title to said land; that they have ever since said 22nd day of April, 1889, occupied said town site as attorneys, and are now actual occupants as such attorneys thereof and residents of Guthrie, Logan County, Oklahoma Territory.

That on the 14th day of May, 1890, the Congress of the United States passed "an act to provide for town site entries of lands in what is known as Oklahoma, and for other purposes," and that in pursuance of said act the said Daniel J. McDaid, John H. Shanklin, William H. Merriweather were duly appointed, and have been and are now duly qualified and acting as trustees to execute the terms of said act of May 14th, 1890, and, having duly qualified as such trustees and entered upon the performance of their duties as such on the 2nd day of August, 1890, said parties, respondents, as such trustees entered the east half of section 8, in township 16 north, of range 2 west, in Oklahoma Territory, upon which is situated the town site of said Guthrie, in trust for the several use and benefit of the occupants thereof according to their respective interests, and made survey thereof into lots, blocks, squares, streets, and alleys, and assessed upon each of the lot' on said town site the sums of money contemplated by the provisions of said act. That they assessed upon lot 5, block 56, the sum of $21.60, and upon lot 4, of block 56, the sum of $27.04.

That thereafter on the 1st day of September, 1890, a patent was duly executed by the United States through its President, Benjamin Harrison, by which the United States conveyed absolutely to the respondents as trustees aforesaid, all its right, title, and interest in and to said east half of section 8, township 16 north, range 2 west, in Logan County, Oklahoma Territory, being the land upon which was situated the said town site of

Guthrie, which said patent was duly recorded in the office of the county clerk of this Logan County, in book 4, miscellaneous records, at
5 page 74, on the 8th day of December, 1890.

That on the 23rd day of September, 1890, these relators filed with said respondents joint application No. 1784, for deed to lots 4 and 5 in block 56, of Guthrie; that on the same day one John M. Galloway filed application No. 1844, for the same lots; that on or about January 15th, 1891, said John M. Galloway died, and his death was suggested in the record filed with said trustees, respondents herein, and notice was issued and served upon the widow and heirs of said John M. Galloway, of the hearing of claimants to said lots.

That thereafter the said respondents, trustees under the provisions of act of Congress of May 14th, 1890, proceeded to hear controversies of lot claimants upon the town site of Guthrie, and to execute and deliver deeds for said lots to claimants therefor, and that in the performance of such duties, in accordance and compliance with the law and all lawful instructions therefor, a hearing was granted by said respondents to claimants for said lots 4 and 5 in block 56; that these relators were claimants for said lots, appeared at such hearing as such, made proof of right to title thereto, and in every way complied with all legal requirements and obligations as claimants to entitle them to a deed in fee simple for said lots; that said hearing was had on the 10th and 11th days of March, 1891, at Guthrie, by said board of trustees; that at said hearing the widow and heirs of John M. Galloway appeared and produced testimony in their behalf, and that these relators and the widow and heirs aforesaid of said Galloway were the only claimants for said lots.

After a full hearing of two days, of all claimants, and an examination of the testimony given the said respondents, Daniel J. McDaid,
6 John H. Shanklin, and William H. Merriweather, as trustees for the benefit of the occupants of the town site of Guthrie, according to their respective interests, in consideration of and acting upon all the testimony submitted at said hearing, did on the 6th day of April, 1891, unanimously render judgment in the matter in favor of these relators and against the heirs at law of said John M. Galloway, and did then and there order and decree as follows:

"From the testimony adduced on the trial of the cause and from all the circumstances surrounding the case, we deem the claimants, Winfield S. Smith and Stephen H. Bradley, entitled under the law to the occupancy of the lots in dispute and to a conveyance from the trustees. Wherefore it is ordered that a deed be executed to them jointly for lots 4 and 5 in block 56."

That said decree was reduced to writing and subscribed by Daniel J. McDaid, and John H. Shanklin, and William H. Merriweather as trustees, and publicly announced.

The relators further declare that on the 25th day of April, 1891, they tendered to the respondents at Guthrie the sum of $48.64 in lawful money of the United States, being the full amount assessed upon said lots by said respondents as trustees for the purposes contemplated in the said act of May 14th, 1890, and demanded of said respondents a deed for said lots in the execution of their trust, which it was then their legal duty to execute and deliver to these relators, but that the respondents, unlawfully, and

in direct violation of their plain legal duty as trustees under the law creating them and their duty, refused, and still refuse, to execute and deliver to these relators the said deed to which these relators are lawfully entitled.

That these relators were unlawfully, violently, and forcibly
7 evicted from said lots in July, 1889, by said John M. Galloway and James P. Galloway, his heir, and that ever since the said John M. Galloway, in his lifetime, and since his decease his said heirs, have been in possession thereof; that these relators were and are greatly damaged by the loss of the use of their said property by the withholding of said deed by respondents, and are without legal redress for the injury likely to ensue from the prolonged litigation of this controversy and are without adequate legal remedy for said wrong, for the reason that said Galloway died insolvent, leaving no estate, and that the widow and heirs are also without financial recourse to satisfy any judgment that might be obtained by any action open to relators; that the said lots are very valuable, and worth actual value of $2,000 a year; that these relators have now been out of possession of said lots nearly two years, and should this application be denied, the hinderance and delay to relators' rights would be long and amount to thousands of dollars in damage.

That there is *now* lawful reason or physical hinderance to prevent the said respondents from execting and delivered to relators the said deed.

That these relators are informed and believe that the widow and heirs of said John M. Galloway have filed what purports to be, and is intended as, an appeal from the decision of said board of trustees to the Hon. Commissioner of the General Land Office at Washington, D. C., and that this fact alone is the sole ground of respondents' refusal to comply with the relators' demand.

Now these relators allege further:

First. That such fact is no legal excuse for such refusal.

Second. That no law exists creating an appeal from the respondents as a board of town-site trustees to any person, officer, or tribunal whatever.

8 Third. That the Hon. Commissioner of the General Land Office has no legal authority to either review, reverse, or affirm the decision of the said respondents made respecting the lots herein named nor any jurisdiction over the execution and delivery of deed to said lots at the present status of the case.

Fourth. That there is no appeal from the decision or finding of said respondents as to persons entitled to deed to said lots.

Fifth. Said respondents as a board of trustees, have exercised all their discretion in the matter of said lots and must in law perform the remaining act, purely ministerial, execute and deliver to these relators the deed mentioned and ordered in their decision above set forth.

Wherefore these relators pray that a writ of mandate may issue commanding the said respondents to receive the said fees tendered, and, as trustees for the town site of Guthrie, Oklahoma Territory, to execute and deliver to these relators a joint deed in fee for lots 4 and 5, in block 56, of Guthrie, Logan County, Oklahoma Territory, and that such other and further relief as is proper herein be granted.

WINFIELD S. SMITH.
STEPHEN H. BRADLEY.

9 OKLAHOMA TERRITORY, *Logan County, ss:*

Winfield S. Smith and Stephen H. Bradly each of lawful age and being duly sworn on his oath says that he has read the foregoing petition or complaint for a writ of mandate and knows the contents thereof and that the facts therein set forth are true of his own knowledge, except as those matters therein alleged to be stated upon information and belief, and as to those matters he verily believes them to be true.

WINFIELD S. SMITH.
STEPHEN H. BRADLEY.

Subscribed and sworn to before me this 27th day of April, 1891.

JAS. C. JAMISON,
Notary Public.

Com. Ex., Dec. 27, 1894.

10 And thereafter, on the 11th day of May, A. D. 1891, the said defendants appeared in said court by their attorney, Horace Speed, and filed their answer as follows:

In the district court of said county.

UNITED STATES OF AMERICA,
Territory of Oklahoma, Logan County, ss:

THE TERRITORY OF OKLAHOMA, ON RELATION of Winfield S. Smith and Stephen H. Bradley,
vs.
DANIEL J. MCDAID, JOHN H. SHANKLIN, AND William H. Merriweather, trustees of the townsite of Guthrie, Oklahoma Territory, respondents.

Answer to petition of writ of mandate.

Daniel J. McDaid, John H. Shanklin, and William H. Merriweather, trustees for townsite of Guthrie, in said Territory, answering the petition, herein say:

That they were appointed by the Secretary of the Interior, and under act of Congress in that behalf, trustees of the townsite of Guthrie, and they have, as such trustees, received a patent from the President of the United States for the east ½ of section 8, in Township 16 north, range 2 west, of Indian meridian, and that as to lot 4 and 5 in block 56 of such townsite, claimed by the petitioners and also by John M. Galloway during his lifetime, and by his heirs after his death, these defendants as such board decided that the petitioners were entitled thereto and to a conveyance from these defendants therefor, and on, to wit, the 6th day of April, 1891, ordered that a deed to the defendants, jointly, be executed for said lots.

11 But the defendants say that thereafter, on the day of April, 1891, the said heirs of the said John M. Galloway, who were

rightfully parties to the litigation before this board concerning the title to said lots, and who were claiming the lots, duly filed their appeal from the decision of this board to the Commissioner of the General Land Office pursuant to the instructions under act of Congress under which this board was appointed, such instructions having been made by the Secretary of the Interior authorizing appeals by claimants to lots in cases where such claimants feel themselves aggrieved by the decisions of this board.

And these defendants, further answering, say that there is a right of appeal given by the instructions of the Secretary of the Interior and recognized by this board, and that appeals in similar cases have been taken by other persons from other decisions of this board both before and after the appeal taken in this case.

And these defendants say that they were appointed by the Secretary of the Interior and that at the time of their appointment were directed to allow appeals from their decisions where such appeals were properly prayed, and that the decision in this case was properly prayed, and under such instructions was granted.

And these defendants further say that the question of legal ownership as to said lot has not been definitely settled by the higher tribunals of the Interior Department, and that no deeds have passed for such lots and should not pass until such appeal is disposed of, and that under such circumstances is it not for this court by mandate or otherwise to direct in what manner or to whom conveyances of lands or lots, the title which is in the United States, should be conveyed to individuals?

12 Wherefore these defendants pray that they be hence dismissed with their costs.

D. J. McDAID,
JOHN H. SHANKLIN,
WILLIAM H. MERRIWEATHER,
Trustees.

By HORACE SPEED,
Their Atty.

13 TERRITORY OF OKLAHOMA,
Logan County, ss:

Horace Speed, United States attorney for said Territory, being duly sworn, upon his oath says:

That he is attorney for the defendants herein, and that he has read the above and foregoing answer, and knows the contents thereof, and that the allegations therein contained are true, as he is informed and believes.

HORACE SPEED,
Atty. for Defts.

Subscribed and sworn to before me this 11th day of May, 1891.

T. G. RISLEY,
Clerk.

[SEAL.] By S. K. VAN VOORHEES,
Act'g Deputy.

14 And thereafter, on, to wit, the 15th day of May, A. D. 1891, the plaintiff files demurrer to the defendants' answer, as follows:

In the district court, Logan Co., Ok. Ter.

THE TERRITORY OF OKLAHOMA
vs.
JOHN H. SHANKLIN, DANIEL J. MCDAID, WILLIAM H. Merriweather, on the relation of Winfield S. Smith and Stephen H. Bradley, as trustees.

Come now the relators, on this 15th of May, 1891, by H. S. Cunningham, attorney, and demurr to the defendant's answer herein filed, for the reason that the same does not state facts sufficient to constitute any valid or lawful defense in this action.

WINFIELD S. SMITH,
STEPHEN H. BRADLEY,
Relators.
H. S. CUNNINGHAM,
Attorney.

And thereafter, on the 16th day of May, A. D. 1891, the parties appeared in said court by their respective counsel, and thereupon the following further proceedings were had in said court, to wit:

And now, on the 16th day of June, 1891, this cause came on to be heard upon issue joined by demurrer to the answer of the defendants, and the said relators appearing in person and by their attorney, Harper S. Cunningham, and the said defendants also appearing in person and by their attorney, Horace Speed, and the court having heard the arguments of counsel and being fully advised in the premises, now here sustains
15 the said demurrer, and thereupon the said defendants, by their attorney, then and there duly objected and excepted to said ruling, and the said defendants also then and there made their motion to dismiss said cause for the reason that the Territorial court had no jurisdiction of the subject-matter of the action, and the court being fully advised in the premises overruled and denied said motion, to which order and ruling the defendants, by their attorney, then and there duly objected and excepted. And the said defendants then and there elected in open court to stand upon said demurrer and motion and their exceptions thereto.

It is therefore ordered and adjudged that the said defendants Daniel J. McDaid, William H. Merriweather, and John H. Shanklin, and each of them do forthwith make, execute, and deliver unto the said relators Winfield S. Smith & Stephen H. Bradley, a good, sufficient, and proper deed for lots No. (4 & 5) four and five, in block No. (56) fifty-six, in the city of Guthrie in the Territory of Oklahoma, and convey to them the full, legal, and equitable title thereto, and hereof fail not under the penalties of the law, and hereof let peremptory writ of mandamus issue. It is further ordered and adjudged that the said defendants do pay the costs of this case, taxed at $ dollars, and hereof execution issue. And thereupon the said defendants, by their attorney, prayed an appeal to the Supreme Court, which prayer was by the court granted and the appeal

bond was fixed by the court in the sum of $500, to be conditioned and approved as required by law. And ten days is given to file the proper bills of exceptions, transcript, and perfect the appeal.

Respectfully submitted.

HARPER S. CUNNINGHAM,
Att'y for Relators.

O. K.

Att'y for Def'ts.

Approved.
E. B. GREEN,
Judge.

16 TERRITORY OF OKLAHOMA,
Logan County, ss:

I, Theodore G. Risley, clerk of the district court in said county and Territory, do hereby certify that the above and foregoing transcript contains true and complete copies of all the papers and entries in said cause.

In witness whereof I do hereunto set my hand and affix the seal of said court, at the city of Guthrie, this day of July, A. D. 1891.

T. G. RISLEY,
Clerk District Court.

17 TERRITORY OF OKLAHOMA:

In the supreme court, January term, 1891.

DANIEL J. MCDAID, WILLIAM H. MERRIWEATHER, John H. Shanklin, Board No. one, townsite trustees, appellants,
vs.
THE TERRITORY OF OKLAHOMA, ON RELATION OF Winfield S. Smith and Stephen H. Bradley, appellees.

Assignment of errors.

The appellants say there is manifest error in the judgment and proceedings in this cause, in this:

1. The complaint does not state facts sufficient to constitute a cause of action.
2. The court had no jurisdiction of the subject matter of the action.
3. The court erred in sustaining the demurrer to the answer of these appellants.
4. The court erred in overruling the motion of these defendants to dismiss the action.

Wherefore the appellants pray that the judgment be reversed.

HORACE SPEED,
Attorney for Appellants.

18 TERRITORY OF OKLAHOMA:

To the sheriff of the supreme court, greeting:

You are hereby commanded to notify the Territory of Oklahoma and Winfield S. Smith and Stephen H. Bradley that on the day of July, A. D. 1891, Daniel J. McDaid, William H. Merriweather, and John H. Shanklin filed in the office of the clerk of the supreme court a transcript of the record and proceedings in a certain suit appealed from the district court of Logan County, in said Territory, in which the said Territory of Oklahoma on the relation of the said Winfield S. Smith and Stephen H. Bradley was plaintiff and the said Daniel J. McDaid, William H. Merriweather, and John H. Shanklin were defendants. And you will notify said appellee and said relators to appear at the supreme court room at the city of Guthrie, before said supreme court, and defend said appeal on the day of , A. D. 1891, else the same will be proceeded upon in their absence.

And have you then and there this writ.

Witness my hand and seal of said court at the said city of Guthrie this day of July, A. D. 1891.

Clerk Supreme Court.

Sheriff's return.

Came to hand this day of July, A. D. 1891. Served this notice on the within named Territory of Oklahoma by reading the same to and within the hearing of Harper S. Cunningham, attorney for said Territory of Oklahoma, and Winfield S. Smith and Stephen H. Bradley, relators, this day of , A. D. 1891.

Sheriff Supreme Court.

19 *Notice.*

In the district court.

TERRITORY OF OKLAHOMA,
Logan County:

TERRITORY OF OKLAHOMA ON THE RELATION OF Winfield S. Smith, Stephen H. Bradley, plaintiff,
vs.
DANIEL J. MCDAID, WILLIAM H. MERRIweather, and John H. Shanklin, defendants.

Notice to party.

The above named plaintiff and relators are hereby notified that the defendants will appeal to the supreme court of the Territory of Oklahoma from the judgment rendered against them in this action in the district court on the 16th day of June, A. D. 1891.

HORACE SPEED,
Attorney for Defendants.

20 And be it further remembered, that thereafter, on to wit, the 17th day of August, 1891, an order of supersedeas in said case in said supreme court was issued by John G. Clark, associate justice of said supreme court and filed in said court on to wit, the 17th day of August, 1891, which said order of supersedeas was in words and figures following, to wit:

In the supreme court of the Territory of Oklahoma. Supersedeas.

D. J. McDaid, Wm. H. Merriweather, and John H. Shanklin, appellants,
vs.
Winfield S. Smith and Stephen H. Bradley, appellees.

On application of the appellants it is ordered by the undersigned, one of the judges of the supreme court of the Territory of Oklahoma, that execution and other proceeding of the court below be stayed, and it appearing that the capacity in which said appellants are sued, and, consequently, whether they are required to give a bond, are questions at issue in said appeal, it is therefore ordered that said supersedeas take effect without the giving of bond by said appellants.

Done this 17th day of August, 1891.

John G. Clark,
Associate Justice of the Supreme Court of Oklahoma Territory.

21 And be it further remembered, that on the 31st day of October, 1891, the same being the tenth day of the second regular term of the supreme court of the territory of Oklahoma, a motion was filed by H. S. Cunningham, counsel for appellees, asking that this cause be advanced on the docket and that it be set down for hearing at once, whereupon it was ordered by the court that counsel prepare briefs and abstracts, and submit the same and the cause would be taken by the court, and furthermore, leave was granted appellees to cite townsite board No. six as successors to appellants to interplead in this cause.

And be it further remembered, that on the 7th day of April, 1892, the same being one of the judicial days of said court, this cause came on for argument upon the regular call of the docket, and was argued on behalf of appellants by Horace Speed, United States attorney.

And be it further remembered, that on the 8th day of April, 1892, the same being also one of the judicial days of said court, the argument of this cause was resumed and argued on behalf of the appellees by H. S. Cunningham, whereupon the cause was submitted and taken under consideration by the court.

22 And be it further remembered, that on the 6th day of July, 1892, this cause came on for decision, and the court being fully advised in the premises, thereupon it was ordered and adjudged by the court that the decision of the district court of Logan County be affirmed with costs.

And at the same time was rendered the opinion of the court, presented by Justice Burford, of the said supreme court, and also a dissenting opin-

ion by Justice Clark, of said supreme court, which opinions are in the words and figures following, to wit:

23 Territory of Oklahoma, supreme court, June term. 1892.

DANIEL J. McDAID, WILLIAM H. Merriweather, and John H. Shanklin; Board No. 1, townsite trustees, appellants,
vs.
THE TERRITORY OF OKLAHOMA, on relation of Winfield S. Smith and Stephen H. Bradley, appellees.

Opinion.

Appeal from district court, Logan County.

BURFORD, J.:

The appellees filed their petition in the district court of Logan County, in which they alleged substantially, that the appellants were the duly appointed qualified and acting board of trustees for the townsite of Guthrie, Oklahoma, under the provisions of the act of Congress, approved May 14th, 1890. (26 Stat., 109.)

That on the 2nd day of August, 1890, said trustees entered the east half of section 8, in township 16 north, range 2 west, in Oklahoma Territory, upon which tract is situate the townsite of Guthrie, and that said townsite was laid off into lots, blocks, squares, streets, and alleys, and the lots duly assessed for the expense of executing said trust. That on Sept. 1, 1890, a patent was duly executed by the United States, through its President, Benjamin Harrison, by which said tract was conveyed to said trustees aforesaid in trust for the several use and benefit of the occupants
24 thereof according to their respective interests, which said patent was by said trustees duly recorded in the office of the county clerk of Logan County on the 8th day of Dec., 1890.

That at the time said entry was made and since the 22nd day of April, 1889, the appellees were, and had been bona fide residents on and occupants of lots 4 and 5 in block 56, of the townsite of Guthrie, which lots were a part of the lands embraced in said entry and patent aforesaid.

That appellees filed their claim to said lots with said board of trustees, as did also one John M. Galloway, who claimed to be the legal occupant thereof. That said Galloway having died his heirs were permitted to prosecute his claim to said lots. That said trustees set said matter for hearing as between appellees and the heirs of Galloway, and after hearing the evidence in said cause, said trustees made and entered the following judgment and decree: "From the testimony adduced on the trial of the cause and from all the circumstances surrounding the case, we deem the claimants, Winfield S. Smith and Stephen H. Bradley, entitled under the law to the occupancy of the lots in dispute and to a conveyance from the trustees. Wherefore it is ordered that a deed be executed to them jointly for lots 4 and 5 in block 56."

Which decree was reduced to writing and signed by said trustees on the 6th day of April, 1891.

That on the 25th day of April, 1891, appellees tendered to said trustees the full amount of costs assessed against said lots and demanded a deed from said trustees, which they refused to sign or deliver, for the reason that Galloway's heirs had appealed from their decision to the Commissioner of the General Land Office.

They further allege that the said lots are of great rental value,
25 that Galloway's heirs are in possession collecting the rents and profits, and that they are insolvent and they have no adequate legal remedy.

And they pray that a writ of mandate issue commanding said trustees to accept the fees tendered, and to execute a joint deed for said lots to the relators, Bradley and Smith, pursuant to the award in their favor.

The appellants filed an answer to this petition, in which they admit all the material allegations, but attempt to avoid the same by alleging that they were acting under the instructions of the Secretary of the Interior, who had prescribed rules and regulations directing that any person aggrieved by their decision should be allowed an appeal to the Commissioner of the General Land Office, and that from said decision in favor of appellees an appeal had been taken and was then pending *in*disposed of.

The appellees demurred to this answer for want of sufficient facts to constitute a defense, and the demurrer was sustained by the court and exceptions duly taken by appellants.

Appellants then moved to dismiss said cause for the reason that the court had no jurisdiction of the subject-matter of the action. This motion was overruled, to which ruling appellants excepted, and thereupon elected to stand upon their demurrer and motion to dismiss. Whereupon the court rendered judgment against appellants and ordered them to forthwith make a deed to appellees for said lots and deliver same, and that a peremptory writ of mandate issue to them.

From this judgment said trustees appealed to this court, and assign as error the following specifications:

1st. The complaint does not state facts sufficient to constitute a cause of action.

26 2nd. The court had no jurisdiction of the subject-matter of the action.

3rd. The court erred in sustaining the demurrer to the answer of appellants.

4th. The court erred in overruling the motion of the defendants to dismiss the action.

All the questions presented by the record are embraced in the 3rd and 4th assignments of error.

We will treat these questions in the inverse order in which they are presented, and consider first the question of the jurisdiction of the trial court.

The organic act of the Territory of Oklahoma, 26 Stat. at Large, p. 85, provides "that the judicial power of said Territory shall be vested in the supreme court, district courts, &c. The jurisdiction of the several courts herein provided for, both appellate and original, shall be as limited by law, * * * and the said supreme court and district courts, respectively, shall possess chancery as well as common law jurisdiction, and au-

thority for redress of all wrongs committed against the Constitution or laws of the United States or of the Territory affecting persons or property. * * * Said Territory shall be divided into three judicial districts, and a district court shall be held in each county in said district thereof by one of the justices of the supreme court. * * * The supreme court shall define said judicial districts, and shall fix the time and place at each county seat, in each district where the district court shall be held, and designate the judge who shall reside therein, * * * and each of said district courts shall have and exercise, exclusive of any court heretofore established, the same jurisdiction in all cases arising
27 under the Constitution and laws of the United States as is vested in the circuit and district courts of the United States. * * * The said supreme and district courts of said Territory, and the respective judges thereof, shall and may grant writs of mandamus and habeas corpus in all cases authorized by law."

It will be observed that Congress has vested in the district courts of the Territory special authority to grant writes of mandamus, and has also conferred upon them full common law powers and jurisdiction, with the special right to grant writs of mandamus in all cases authorized by the common law or any law of the United States then in force.

If the petitioners were at the common law entitled to this remedy, then the district court of the Territory has the power to grant and issue the writ of mandamus.

United States vs. Chenney, (102 U. S., 378). We must therefore consider this writ as it was known at the common law with respect to its object and purposes. It is a writ in England issuing out of the King's Bench in the name of the King, and is called a prerogative writ, but considered a writ of right, and is directed to some person, officer, corporation, or inferior court, requiring them to do some particular thing there in specified, which appertains to their duty or office, and which is supposed to be conservant to right and justice, and where there is no other adequate specific remedy. Such a writ, and for such a purpose would seem to be peculiarly appropriate in this case; the right claimed is just, and is established by the judgment and decree of the special tribunal, created for the purpose and authorized by law to determine that right, the duty required to be done is clear and specific, and there is no other adequate remedy.
28 The Supreme Court of the United States, in construing and defining the powers and jurisdiction of the circuit court of the District of Columbia, held that by reason of said court possessing common law powers and jurisdiction, that it had the authority to issue writs of mandamus.

Kendall vs. United States (12 Pet., 524).

It is contended by appellants that they are Federal officers, and that the court has no power to issue a writ of mandamus requiring them to perform a duty imposed upon them by a United States law, and in support of this position we are cited the cases of McIntyre vs. Wood (7 Cranch, 504), and McClung vs. Silliman (6 Wheaton, 349), but the decisions in the above cases turned upon the powers and jurisdiction of the circuit courts of the United States in the several States, and in the later case of Kendall vs. U. S., (12 Peters, 524), the court cites, reviews, and distinguishes the two former cases, and others, and holds that the authority to

issue a writ of mandamus to an officer of the United States, commanding him to perform a specific act, required by law, is within the judicial powers of the United States and Constitution, but that the whole of that power has not been vested in the circuit courts of the United States, in the several States, and that there is nothing growing out of the official character of a party that will exempt him from this writ, if the act to be performed is merely a ministerial one.

Congress has conferred upon the district courts of this Territory the whole judicial power vested in the United States and Constitution in this particular, and their powers and jurisdiction are even more extensive than that of the district and circuit courts of the United States.

29

That mandamus will lie to compel a Federal officer to perform a duty not involving the exercise of judgment or discretion is now well settled by the decisions of the Supreme Court of the United States.

U. S. ex rel. McBride vs. Schurtz (102 U. S., 378).

Marberry vs. Madison (1 Cranch, 137).

Boynton vs. Blaine (139 U. S., 306).

Butterworth vs. U. S. (112 U. S., 50).

In the case at bar the trustees had fully exercised their judgment and discretion when they decided that the appellees were entitled to a deed. The duty to prepare it, sign it, and deliver it to the relators were all purely ministerial. This duty they failed and refused to perform merely out of deference to the instructions of the Secretary of the Interior, that the parties were entitled to an appeal from said decision.

Counsel for appellants contend that our courts stand in the same relation to the Federal Government and its officers as the courts of the several States, and as it was held in the case of McClung vs. Silliman 6 Wheaton, 598, that a State court could not mandamus a Federal officer for the reason that such officer is subject only to the power that created him, therefore the trial court in this case has no such authority. The case relied upon is not applicable and can not control in the case at bar. The courts of this Territory are created by and derive their powers from the Federal Government, and, whether sitting as Territorial or Federal courts, they derive their powers, authority, and jurisdiction from the Constitution and laws of the United States. And conceding without deciding that the townsite trustees are Federal officers, they, as such trustees or officers, and the trial court were created by the same control'ing power, and the rule as to the authority of State courts over such officers is not applicable.

30

The next assignment of error to be considered involves the sufficiency of appellant's answer as tested by the demurrer, and this presents the paramount and controlling question in this case, viz: Whether there exists a right of appeal to the Commissioner of the Gen. Land Office or Secretary of the Interior from the decision and judgment of the townsite trustees awarding the several lots to the occupants thereof, as found and determined by them?

The appellants as townsite trustees were appointed by the Hon. Secretary of the Interior pursuant to the provisions of the act of Congress approved May 14, 1890 (26 Stat. at Large, 109), entitled "An act to provide for townsite entries of lands in what is known as Oklahoma, and for other purposes."

The first section of said act provides "that so much of the public lands situate in the Territory of Oklahoma now open to settlement as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes, as near as may be, and when such entry shall have been made the Secretary of the Interior shall provide regulations for proper execution of the trust by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots, when necessary, or the approval of such survey as may already have been made by the
30½ inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such townsite, cost of survey, conveyance of lots, and other necessary expenses, including compensation of trustees."

Sections two and three refer to the qualifications of claimants to lots and what may be taken as evidence of occupancy.

Section 4 provides "that all lots not disposed of as hereinbefore provided for shall be sold, under the direction of the Secretary of the Interior, for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section."

Section 5 makes certain provisions of the townsite laws of the State of Kansas applicable to govern the trustees in the performance of their duties.

Section 6, among other things, provides "that all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act, and upon the application of the trustees herein provided for such entries shall be prosecuted to final issue in the names of such trustees without other formality, and when final entry is made the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided."

Section 7 gives the trustees power to administer oaths, to hear
31 and determine all controversies arising in the execution of the trust, and require them to keep a record of their proceedings, execute conveyances duly acknowledged, &c., &c.

It will be observed that this act itself nowhere provides for any appeal from the action of the trustees, but it is contended that the Secretary of the Interior has the authority to provide by rule for an appeal, and that on June 18, 1890, the Secretary promulgated a set of rules and regulations for the guidance of said trustees in the execution of their trust, Rule 13 of which is as follows: "Any person feeling aggrieved by your judgment may, within ten days after notice thereof, appeal to the Commissioner of the General Land Office under the rules (except as to time) as provided for appeals from the opinions of registers and receivers, and if either

party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal within ten days from notice thereof to the Secretary of the Interior upon like terms and conditions and under the same rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary, except as modified by the time within which the appeal is to be taken." 10 L. D., 670.

It is claimed that the Secretary has the authority to prescribe this rule by virtue of sections 441, 442, and 453, Revised Statutes U. S., by which he is charged with the supervision of the public officers relating to public lands.

In the case of Snyder vs. Sickles (98 U. S., 210) it was held that the Secretary has the power under these statutes to supervise all matters relating to public lands, including appeals, in all cases.

32 This decision is in harmony with our views in this case, but there is a clear distinction between the case ruled on by the court in Snyder vs. Sickles and the case at bar.

The powers of the Secretary of the Interior, as prescribed by statute and defined by the court in the case last cited, relate solely to *public lands*, the title to which is still in the United States.

It is a well-established principle of law, affirmed by numerous decisions of the Supreme Court of the United States, that the courts will not interfere with the officers of the Government while in the discharge of their duties in disposing of the public lands either by injunction or mandamus. Marquery vs. Frisbie (101, U. S., 473). And it is equally as well settled that after patent issues the title of the United States passes, and the Executive Departments and land officers loose all control over the lands embraced in the patent.

Mr. Justice Miller, speaking for the court in Moore vs. Robbins (96 U. S., 530) defines the law as follows: "While conceding for the present to the fullest extent that when there is a question of contested right between private parties to receive from the United States a patent for any part of the public land, it belongs to the head of the Land Department to decide that question. It is equally clear that when the patent has been awarded to one of the contestants and has been issued and delivered and accepted, all right to control the title, or to decide on the right to the title, has passed from the Land Office.

Not only has it passed from the Land Office, but it has passed from the executive department of the Government.

33 "A moment's consideration will show that this must in the nature of things be so.

"We are speaking now of a case in which the officers of the department have acted within the scope of their authority. The offices of register and receiver are mainly for the purpose of supervising the sales of public lands, and it is a part of their daily business to decide when a party has by purchase, preëmption, or any other recognized mode established a right to receive from the Government a title to any part of the public domain. This decision is subject to an appeal to the Secretary, if taken in time. But if no such appeal is taken and the patent issues under the seal of the United States, and signed by the President, is delivered to and accepted

by the party, the title of the United States passes with this delivery. With the title passes away all authority or control of the executive department over the land and over the title which it has conveyed.

"The functions of the department necessarily cease when the title has passed from the Government. And the title does so pass in every instance when, under the decisions of the officers having authority in the matter, a conveyance generally called a patent has been signed by the President and sealed and delivered to and accepted by the grantee. It is a matter of course that after this is done neither the Secretary nor any other executive officer can entertain an appeal. He is absolutely without authority."

The foregoing opinion is directly in point and decisive of the case under consideration. The only duty incumbent upon the officers of the Land Department, as prescribed by the act of May 14, 1890, was after
34 the appointment of the trustees, and prescribing rules to govern them in the discharge of their trust, to determine and decide whether or not the lands embraced in their town-site application was settled upon and occupied for purpose of trade and business. Having determined this, and that there was no prior valid existing adverse right, it was the duty of the Department to allow the entry, and issue a patent to the trustees, conveying to them the title of the United States in trust for the use and benefit of the occupants of said lands as their several rights might appear, and having issued and delivered the patent, executive control over the lands embraced in the patent ceased, and the officers had no further authority or control over the title, except as might be given by the special act of May 14, 1890.

The Secretary had the authority, under his general powers and duties, to prescribe rules to govern the trustees in making entry and purchase of said lands for town-site purposes prior to patent, but when patent issued his general authority ceased, and but for the special authority given in the act of May 14, he would have been without authority to further direct the trustees. But it is specially provided in section 1 of said act, that *after* the entry shall have been made the Secretary may provide regulations for the proper execution of their trust by such trustees. Hence the Secretary gets his authority in this particular instance to provide regulations for guidance of trustees in discharge of their duties after title has passed from the Government from this special act, and not from the general statutes prescribing his authority as head of the Land Department. And the authority to prescribe such regulations can not be extended beyond the terms of the act, and are limited to rules for the survey of the land
35 into blocks, squares, streets, alleys, and lots, the assessment upon the lots of such sum as may be necessary to pay for the lands, costs of survey, conveyance of lots, compensation of trustees, and other expenses, and such other rules as might regulate such matters as were reasonably incident to their duties as town-site trustees.

The right of appeal does not exist in any instance as a matter of right, but is a creation of statutes.

The town-site act in question specifically provides that when the trustees shall make entry of any lands for town-site purposes, the title of the United States to the land covered by such entry shall be conveyed to said trustees

for the uses as provided in the act. This conveyance was made by patent, the Government received the purchase money for the land, delivered the patent, and parted with all control over the title. The trustees held the title in trust for the legal occupants of the several lots, and it was their duty to determine under the law and the regulations prescribed by the Secretary who the legal occupants were at the date of their entry, and when they had so determined, to convey the legal title to such person.

They being trustees for the occupants of the several lots, it followed as a matter of law that, if any lots should not be occupied, there would be no one to take the legal title from them, and the trust would fail for want of a cestuy que trust, in which event the unclaimed lots would have reverted to the grantor or the United States. Congress forsaw this possible contingency, and as a precautionary measure provided that the unoccupied and undisposed-of lots should be disposed of by the Secretary of the Interior for the benefit of the municipality. The Secretary is the head of the Land Department; the Government had received full
36 compensation for the land, and it was not the purpose of Congress under this act to allow any of such lands to revert to the Government because no one had claimed a particular lot; hence this wise precaution of authorizing the head of the Land Department by suitable conveyance to transfer all such lots to the town. But this provision certainly never was intended as contemplating an appeal to the Department on the question between adverse claimants to lots.

This construction is in harmony with the general policy of the Government in reference to town lot controversies, as evidenced by the several enactments of Congress on such subjects.

They have by divers statutes provided for town-site entries by probate and county judges, by mayors and trustees of cities and towns, by special trustees, and by other persons, but never in any statute has there been a provision for trying the title to town lots in the General Land Office, or before the Secretary of the Interior, nor do we find where it has ever been claimed by the Department before that they had such right. It is a well-established rule that statutes should be construed according to the legislative intent. It appears from the original bill introduced for the act of May 14, 1890, that an appeal was therein provided for, but this provision was stricken out in committee and the bill became a law without such provision. It is evident to us that Congress never intended to burden the General Land Office or the Secretary of the Interior with several thousand town-lot contests; but it was intended that the adjudication by the special tribunal created for the purpose of settling such controversies should be final, except in so far as the courts might properly review their acts and decisions.

37 When an appeal is directed by the Secretary which is unauthorized by law the appeal is of no effect, and mandamus will lie to compel the proper officer to perform his duty notwithstanding such appeal.

Butterworth vs. Hoe (112, U. S. 50).

We find no error in the action of the trial court.

We are of the opinion that the relators are entitled to the deed which they demanded of appellants, and that the writ of mandamus by the district court is the appropriate remedy to enforce that right.

The judgment of the district court is affirmed at the costs of appellants.

38 WINFIELD S. SMITH, AND STEPHEN H. Bradley, relators,
vs.
DANIEL J. MCDAID ET AL., TOWN-SITE TRUSTEES John Foster et al., their successors, defendandants.

In the Supreme Court, on appeal from the district court of Logan County.

Dissenting opinion of John G. Clark.

The defendants, Daniel J. McDaid et al., as town-site trustees, under the act of May 14, 1890, and under R. S. 2387 & 2388, entered the town site of Guthrie, and in discharge of their duties awarded certain lots to the relators; from that award the heirs of John M. Galloway appealed to the Commissioner of the General Land Office.

This action was brought to compel the trustees to convey said lots to said relators.

The important question in the case is, does an appeal lie to the Commissioner of the General Land Office?

These defendants are certainly officers of the United States Government, connected with the Interior Department, appointed by the Secretary of the Interior, and have under the law certain important duties to discharge.

The question arises, how far has the head of that Department supervision over these officers and their acts. Under the law it seems that they hold in trust not the whole land, but perhaps certain interests in these lands for the use of others; and that the Secretary of the In-
39 terior has power to dispose of certain portions of these lands, as his judgment may dictate; and that it is his duty to prescribe rules and regulations governing these trustees in the discharge of the duties devolving upon them.

Can he investigate and see whether these appointees of his dispose of these lands pursuant to the law, and pursuant to the regulations prescribed by himself and to the proper persons? Or must he leave it to the courts alone to correct the errors of these appointees?

Clearly, these errors can be corrected by the proper courts in a proper case; but can he, on his own motion, or on an appeal review any judgment of these trustees, however gross? If he can in any particular an appeal lies to the Commissioner and from the Commissioner to him.

A portion of section 2387, touching the entry of town sites, might cast some light upon the matter at issue. It reads as follows:

"It is lawful for—the corporate authorities, or for the *the* judge of the county court—to enter the land so settled and occupied in trust for the several uses and benefits of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted

under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

Under this section the title and the proceeds of the sales of lots and the mode of conducting the sales of lots, and the conveyance of lots are to be conducted under regulations to be prescribed by the legislative authority of the State or Territory where situated.

40 So far as the Government is concerned, after the issuing of the patents under this section, its connection is ended with the land in question.

But the act of May 14, 1890, creates a new set of officers appointed by the Secretary of the Interior to perform their duties under rules and regulations to be prescribed by him.

Section 1 reserves to the Secretary of the Interior the power to prescribe rules and regulations for the proper execution of the trust by such trustees, including the survey of the land into streets, alleys, squares, and blocks and lots—"or the approval of such survey as may have been already made by the inhabitants thereof; the assessment upon the lots of such sum as may be necessary to pay for the lands included in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees."

It will hardly be denied that the Secretary of the Interior can, on his own motion or on appeal, set aside any survey made or adopted since the opinion in Kingth vs. U. S. Land Association, 142 U. S., 177. For a like reason he could set aside an unjust or unequal assessment. If he, on appeal, can correct their mistakes in such matters, why may he not correct their mistakes in conveyances, and as the general superintending agent, set aside their finding and see that the lots are conveyed to the proper parties?

These officers are paid by the U. S. Government in the first instance at least. It is true that certain fees are to be collected by them the same as fees are to be collected by registers and receivers.

41 Their per diem is fixed by the Department. Section 7. They unquestionably could be removed by the power that appointed them, and can not be removed by the Territorial authorities.

They are responsible and have to account to the former and not to the latter.

It is reasonable then to infer that the act does not vest the entire title in the trustees Their superior officer, the Secretary of the Interior, still has the control, for it leaves in his discretion the selling and setting apart of certain indefinate portions. Certain indefinate portions may be sold under his directions, and he may reserve certain parts for public use, and the Secretary must execute conveyances. Section 4.

If the Government has been divested of the title to these town sites, and the title vested in the trustees, why should the Secretary execute conveyances of certain portions of these town sites, and why should other portions be sold under the directions of the Secretary? If the Government is divested of the fee title and the title is vested in private individuals, why are the records and proceedings of these boards to be filed in the General Land Office?

The Government has no interest in the future transfers of the property after the patent issued, if it was entirely divested of title, and of the power to dispose of the lots at the time the paten' issued to the trustees.

It has a very different interest in those lands from what it has it in town sites, when the title has been vested in a mayor or a county judge. In the latter case it takes no notice of the actions of the trustees, but leaves the local authorities to adjust their mistakes.

42 If the moment the patent was issued to the trustees the Government was divested of title, the lands must have that moment become taxable and liable to be sold on executions. It will hardly be claimed that such is the case.

We submit that the only correct position is that the trustees are merely agents of the Government for the purpose of divesting it of its title to these small subdivisions of the public lands.

Under the practice of the Land Department, which has been recognized by the Supreme Court as law, the Secretary of the Interior has been recognized as the supervising agent of the Government. It has always been recognized as his duty to see that justice be done claimants. He is the agent and trustee of the Government, has supervised all the acts of the officials below him.

I do not understand that in such matters an appeal is only a statutory remedy.

By section 2478 of the R. S. the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations every part of the provisions of this title not otherwise specially provided for (public lands).

In 142 U. S., p. 177, Knight vs. U. S. Land Association, the court quoted approvingly the 5th Land D., 494, that held as follows: "Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory directions may be prescribed by such rules and regulation as the Secretary may adopt."

In Buena Vista Co. vs. Iowa Falls and Sioux City R. R., 112 U. S., 165, a question arose whether an appeal would lie from the

43 decision of the Commissioner of the General Land Office under the act of March 5, 1872, donating certain swamp lands in certain counties in Iowa. The Commissioner was to allow or disallow the selections.

Although the statute was silent and it apparently made the decision of the Commissioner of the General Land Office final, yet the court held that an appeal lay to the Secretary of the Interior.

The court in 142 U. S., 181, supra, held that an appeal lay, and "that the Secretary is the guardian of the people of the U. S. over the public lands. The obligation of his oath of office obliges him to see that the law is carried out, and that none of the public domain is wasted or disposed of to a party not entitled to it" (page 182). There is, nowhere, any express power given to the Secretary of the Interior to hear and determine appeals from the Commissioner of Pensions; yet the power is exercised daily without question. "The same remarks apply to the powers of the Secretary of the Interior to supervise and control the management of the Bureau of Indian Affairs, which power, as far as we are advised, has never been questioned."

P. 182. "But if there was any doubt of the existence of such power in the Secretary of the Ioterior, as an original proposition, still the exer-

cise of it for so long a period—going back to the organization of that Department—without question, ought to be considered as conclusive as to the existence of the power. That whole case is worthy of careful consideration in the search for the powers of the Secretary of the Interior."

We are not left entirely to these general deductions. Analogous
44 legislation has received a like liberal construction by the Departments and by the courts. The right of pre-emption (section 2263, R. S.) was to be allowed agreeably to rules to be prescribed by the Secretary of the Interior, but no appeal was provided for except where two persons settle upon the same land (2273). Neither is there a special statutory provision for appeal in the homestead law, yet the uniform practice has been to allow appeals in all cases where applicants for titles to public lands feel aggrieved by the action of the local officers, and their action has been recognized uniformly by the courts as being within the scope of the authority properly exercised by the Interior Department. U. S. vs. McDaniels, 7 Pet., 114.

The construction of the act of May 14, 1890, made by the head of the Department charged with its execution, should have great weight with the courts and should not be overturned unless clearly erroneous. U. S. vs Moore, 95 U. S., 760; U. S. vs. Philbrick, 120 U. S., 52 & 132 U. S., 357.

The position that the Government has parted with its whole title is not well taken. The patent is conditional and is made, it seems to me, to officers of the Government for the benefit of the occupants; but in determining the beneficiaries the claimant has a right to the decision of the Secretary of the Interior, and has the right to appeal to him.

In the conditional patents issued to Indian allotments under the provisions of section 4, act of February 8, 1887, the right is exercised by the Interior Department to cancel, annul, or change said patents at the discretion of the Secretary of the Interior.

Since it is not to be presumed that jurisdiction would be retained by the
Secretary of the Interior, as to a part of such town sites and not
45 as to the whole, I must conclude that an appeal as provided for in paragraph 13 of the circular of instructions (10 L. D., 666), from the decision of said town site board will lie if perfected as required therein.

Now, should we forget that this action was commenced on the territorial side of that court?

In the 3rd Wallace, p. 236, Nebraska vs. Lockwood a question very much like this was before the courts. An information had been filed by the district attorney of the county in the nature of a quo warranto on the relation of Eleazer Wakely against the defendant Lockwood to test his right to the office of associate justice. To the information a demurrer was filed. The demurrer was sustained and the case was carried to the supreme court. Justice Swayne delivered the opinion. The court quoted approvingly 6 Wheaton, 292, Minas Bank vs. United States, wherein it was held that "a State court can not issue a writ of mandamus to an officer of the United States. His conduct can only be controlled by the power that appointed him." The people of the Territory have no agency in appointing these judges and no power to remove them. The Territorial legislature can not prescribe conditions for the tenure or loss of the office. Such legislation on their part would be a nullity. Impeachment and convic-

tion by them would be futile as to removal. The right of the Territory to prosecute such an information as this would carry with it the power of conviction without the consent of the Government from which the appointment was made. This the Territory can no more accomplish in one way than another." Thus spoke the Supreme Court of the United States.

46 But take another view of this matter, if the trustees should feel themselves constrained to obey the commands of their superior officers, the Secretary of the Interior, and disobey the mandate of this court they are liable to be improsoned and fined and mulcted in costs. On the other hand should they disobey the command of the Secretary of the Interior and obey the mandate of this court they might be removed by that officer.

The whole matter amounts to this; we find ourselves as a Territorial court endeavoring to control a United States office or close it up for not obeying the mandate of this court. This court surely has no such power. It can not remove the trustees. It can not imprison for such an offense, and therefore can not enforce its mandates? It occurs to me that the sheriff should he attempt in a State to enforce such a mandate of a supreme court would be in danger of being punished for interfering with U. S. officials.

But take another view of this case; if the title is vested in the trustees for the benefit of others and the United States was entirely divested of title the trustees must convey the title to the cestue que trust and to no other person. He must make no mistakes. The beneficiary can bring suit against the grantee of the trustees to have the deed to him declared a trust deed. He can follow his property into the hands of others wherever it may go, but the trustees is also personally liable for his mistake as well as for his frauds. And may he not be compelled to pay the costs of the real party in interest in procuring the title to his property or the return of it?

On the theory of the prosecution the fee title of property worth
47 immense sums of money has been conveyed in trust to the trustees. They must convey to the real party in interest. Grant that they act honestly, but is that a legal excuse, should they convey to the wrong person? The law, neither territorial nor national, says that they shall be held harmless. In case of a breach of trust. The Cestui que trust is entitled to institute proceedings against the trustees to compel a compensation from him personally for the loss which the trust estate has sustained. 3 Lewin on trusts, p. 900; 6th Wa & S.. 243; 17 Ind., p. 291.

If the town site trustees are not the mere agents of the Government for the purpose of conveying to the occupants of certain lots the title of the same, by what rule of law does the title of any portion of the land deeded to the trustees revert to the United States? If the Government has parted with its title how does it get it back? Certainly not because of failure of beneficiaries.

Suppose for some cause, as malarial or climatic, not a part of the occupants of lots, but all, should abandon the town site after the patent had been issued and before any deeds were issued, it surely will not be claimed that the title would revert or escheat to the United States, the creator of the trust, after it has once parted with the title without reservation. In case of failure of beneficiaries trusts never revert to the author of the trust

when he has parted with the whole title. When he has parted with the whole title he can not afterwards revoke the trust or interfere with the management or execution of the trust. 1st Lewin on trusts, 402; 2d Wash. on R. Pr., 492.

The legal title is in the trustees and there it remains.

48 Is not this the real touchstone and test of the construction of that act? By the act the Secretary of the Interior was to prescribe rules and regulations governing the trustees. They report to him and to no other person. They file their plats, papers, and the records of their proceedings with him. He fixes their pay.

Beyond question he can supervise their work in many particulars, set aside the surveys and plats and assessments. The act reserves to him the power to reserve certain tracts, even after patent to the trustees for public use, and gave to him power to execute deeds to certain tracts. These reservations in case of failure of beneficiaries prevents the title vesting in the trustees and shows that they never had the entire title.

I submit that the most reasonable constructions that can be put upon the act of May 14, 1890, is that the trustees held the title for the Government as a matter of convenience; and that the real title was in the United States, and that in case of failure of d beneficiaries or occupants for any cause, that the Secretary of the Interior could revoke the patent. If he could revoke the patent he yet has the control of the whole matter and the appeal lies to him. Who, upon any other theory, would accept so great a responsibility for so small a compensation?

Another objection equally fatal is the want of necessary parties defendant.

An issue of law has been joined in this action in which the appellants have as great an interest as they had in the issue of fact in that case before the town-site board. In this proceeding, collateral to the action before the town-site board, it is sought to determine the rights of parties to an appeal without their presence. It appears on its face, that the town-site

49 board has no real interest in the matter; but that persons not made parties to this action, claim the title to the property, a transfer of which is herein sought to be commanded; and that such claim of title is adverse to the relators. If the writ of mandamus should be granted, as prayed for, then the right to appeal will be determined, and they have no further remedy before the Land Department and no method to review the findings of the town-site board, except possibly by commencing an action in the district court. These officers do not represent the claimants. They are mere agents for the Government to transfer the title. They might let this action go by default, and thus a proceedings ex parte, so far as the real party in interest is concerned is made to determine the rights of the heirs of the appellant, or they really may be adverse to the interests of the heirs of said John M. Galloway as might naturally be inferred from their judgment adverse to said heirs, and from their correspondence with the Department. They are not the proper persons to protect the interest of the appellants to the Commissioner of the General Land Office.

For these reasons I am forced to conclude that the title does not pass from the Government, until the trustees in obedience to the law and instructions to the Secretary shall have conveyed by deed the lots to the

occupants; and that until that shall have been done the Secretary of the Interior has the entire supervision of the whole matter, and that the judgment of the district court should be reversed.

50 Be it further remembered that then and there upon the announcement of said decision, the said McDaid, Merriweather, and Shanklin, by Horace Speed, their attorney, by the order of the Secretary of the Interior of the United States, in open court prayed a writ of error to the Supreme Court of the United States, and for thirty days within which to perfect appeal under said writ, which writ was then granted, and thirty days from that day was given by the court in the presence of Harper S. Cunningham, attorney for defendants in error.

And thereupon to wit, on the 3rd day of August, 1892, a writ of error under the hand of the honorable Edward B. Green, chief justice of the supreme court of the Territory, was filed with the clerk of the supreme court, which writ of error is in the words and figures following, to wit:

51 A writ of error is allowed as prayed for without bond, it being shown to the court that this writ is prayed for by the plaintif's in error upon the direction of the Honorable John W. Noble, Secretary of the Interior of the United States, and thirty days given within which to file the writ. This 6th day of July, 1892.

EDWARD B. GREEN,
Chief Justice of the Supreme Court of Oklahoma Territory.

52 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the Territory of Oklahoma, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court of Oklahoma Territory, before you pending, the highest court of law or equity in the said territory in which a decision could be had in a suit between Danile J. McDaid, William H. Merriweather, and John H. Shanklin, plaintiffs in error, and the Territory of Oklahoma on the relation of Winfield S. Smith and Stephen H. Bradley, defendant' in error, a manifest error hath happened to the great damage of said plaintiff' in error as by their complaint herein appears; and it being fit that the error if any there hath been should be duly corrected, and full and speedy justice be done to the parties in this behalf, you are hereby commanded if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have the same at Washington on the second Monday of October next in said Supreme Court of the United States to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct the error, what of right and according to law and the custom of the United States should be done.

Witness the Honorable Mellville E. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said supreme
53 court of the Territory of Oklahoma, this 3d day of August, A. D. 1892.

[SEAL.]

CHAS. H FILSON,
Clerk Supreme Court, Oklahoma Territory.

54 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To the Territory of Oklahoma, on the relation of Winfield S. Smith and Stephen H. Bradley, defendant, in error, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein Daniel J. McDaid, William H. Merriweather, and John H. Shanklin are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment mentioned shall not be corrected and speedy justice should not be done to the parties in this behalf.

Attest: The chief justice of the supreme court of the Territory of Oklahoma this 6 day of July, 1892.

EDWARD B. GREEN,
Chief Justice Supreme Court of the Territory of Oklahoma.

55 UNITED STATES OF AMERICA—IN THE SUPREME COURT.

DANIEL J. McDAID, WILLIAM H. MERRIweather, and John H. Shanklin, plaintiffs in error,

vs.

THE TERRITORY OF OKLAHOMA, ON THE RElation of Winfield S. Smith and Stephen H. Bradley, defendant in error.

Affidavit.—Exhibit A.

I. S. Deford and J. W. Wright, being duly sworn, upon their oaths depose and say, each for himself, that he is acquainted with the value of the lots in controversy in the above-entitled cause, and has been for two years last past. That the value of said lots is, and for at least one year last passed has been over five thousand dollars. And further affiant sayeth not.

I. S. DEFORD,
J. W. WRIGHT.

TERRITORY OF OKLAHOMA,
Logan County, ss:

Before me, C. C. Holland, a notary public within and for the county above named, came I. S. DeFord and J. W. Wright, to me well
56 known, and signed the foregoing affidavit, and being duly sworn, upon their oaths say that they have read the same and know the contents thereof, and that the statements therein are true.

In witness whereof I have hereunto set my hand and seal this 1st day of August, A. D. 1892.

[SEAL.] C. C. HOLLAND,
Notary Public.

My com. ex. Jan'y 5, 1895.

57 TERRITORY OF OKLAHOMA,
In the Supreme Court, ss:

DANIEL J. McDAID ET AL.,
vs.
TERRITORY OF OKLAHOMA EX REL, &C.

Upon application of Horace Speed, United States attorney, attorney for plaintiffs in error, and upon good cause shown, thirty days' additional time is given within which to file the writ.

August 3, 1892.

EDWARD B. GREEN,
Chief Justice Oklahoma Territory.

58 UNITED STATES OF AMERICA—IN THE SUPREME COURT.

DANIEL J. McDAID, JOHN H. SHANKLIN, and William H. Merriweather, trustees under act of Congress, for town site of Guthrie, appellants,
vs.
THE TERRITORY OF OKLAHOMA, ON THE relation of Winfield S. Smith and Stephen H. Bradley, appellees.

Assignment of Errors.

The appellants in the above-entitled cause say that many and manifest errors occurred in the hearing and decision of the above entitled cause in the said supreme court of Oklahoma Territory, to the manifest injury of appellants and in violation of their legals rights and contrary to law.

That said errors appear in the record herewith filed, and to which this assignment of error is attached, and which errors are as follows, to wit:

1st. The supreme court of the Territory erred in affirming the judgment of the district court of the first judicial district in said Territory.

2nd. The supreme court of the Territory of Oklahoma erred in not reversing the decision of the district court of the first judicial district of said Territory, in the above-entitled cause.

3rd. The Supreme court of the Territory of Oklahoma erred in holding that the appellants were not officers and agents of the United
59 States in such sense that they cannot be mandamused by the district court of the first judicial district of said Territory at the

instance and on the complaint of the Territory of Oklahoma on the relation of Winfield S. Smith and Stephen H. Bradley.

4th. The supreme court of the Territory of Oklahoma erred in holding that the district court of the first judicial district of Oklahoma had jurisdiction of this matter in the name of the Territory of Oklahoma on the relation of Winfield S. Smith and Stephen H. Bradley against these appellants, trustees for the town site of Guthrie, as aforesaid.

5th. Said supreme court of Oklahoma Territory erred in holding that the title to the town site of Guthrie passed out of the United States to the trustees by the patent so that the United States had no further interest in the land, and had no further control over it or interest in the disposition of it.

6th. The supreme court of said Territory erred in holding that there was no right of appeal from the appellants; as town-site trustees, to the Commissioner of the General Land Office and the Secretary of the Interior, under the act of Congress and the instructions of the Secretary of the Interior.

7th. The supreme court of the Territory of Oklahoma erred in holding that the complaint or petition in the above-entitled action did set out facts sufficient to constitute a cause of action.

8th. The supreme court of the Territory of Oklahoma erred in holding that the district court had jurisdiction of the subject-matter of the action.

9th. The supreme court erred in holding that the district court below committed no error in sustaining the demurrer to the answer of these appellants.

60 10. The supreme court of the Territory of Oklahoma erred in holding that the district court below committed no error in overruling the motion of these appellants to dismiss the action in the district court.

Wherefore appellants pray that the judgment of the supreme court of the Territory of Oklahoma be reversed.

HORACE SPEED,
Attorney for Appellants.

61 I, Charles H. Filson, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing transcript is a true, complete, and full copy of the papers and entries in the said case.

In witness whereof, I have hereunto set my hand and the seal of the court this 3d day of August, A. D. 1892.

[SEAL.]

CHAS. H. FILSON,
Clerk Supreme Court.

62 (Indorsed:) McDaid et al. vs. Bradley et al., from Oklahoma Ter. Transcript.

(Indorsed on cover:) Case No. 15,100. Term No. 1130. Daniel J. McDaid, William H. Merriweather, and John H. Shanklin, plaintiffs in error, vs. The Territory of Oklahoma on the relation of Winfield S. Smith and Stephen H. Bradley. Oklahoma Territory. Supreme Court. Filed August 10, 1892. Supreme Court U. S., clerk's office. Received August 8, 1892.

Office Supr... U. S.
FILED.
APR 24 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

DANIEL J. McDAID ET AL., PLAINTIFFS IN ERROR,
vs.
THE TERRITORY OF OKLAHOMA ON the relation of Winfield S. Smith *et al.*
No. 1130.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

DANIEL J. McDAID ET AL., PLAINTIFFS IN ERROR, *vs.* THE TERRITORY OF OKLAHOMA ON the relation of Winfield S. Smith *et al.*	No. 1130.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

MOTION TO ADVANCE.

This suit was brought to compel the trustees of the town site of Guthrie, Oklahoma, to issue deeds to certain lots.

For the reason stated in the accompanying letter from the Acting Secretary of the Interior, I respectfully move the court to advance the case, and set the same down for hearing early in the October Term, 1893.

CHARLES H. ALDRICH,
Solicitor-General.

19793

DEPARTMENT OF THE INTERIOR,
Washington, April 21, 1893.

The ATTORNEY-GENERAL.

SIR: By letter of July 19, 1892, Mr. Secretary Noble wrote to the Attorney-General concerning the action of the supreme court of Oklahoma Territory in affirming the decision of Judge Green, holding that under the *Act of May* 14, 1890 (26 Stats., 109), an appeal does not lie from the decision of the town-site board of trustees to the Commissioner of the General Land Office, etc., and requested that an appeal be prosecuted to the Supreme Court of the United States, and that said court be asked, on account of the public interests involved therein, to advance the case. I am now informed that it is proposed to present to the Supreme Court such a motion to advance at an early day, and I desire to say that the Department concurs in the recommendation heretofore made, and I again request that the court be asked to advance the case.

The matter is one of great importance to this Department, there being about two hundred and twenty-five cases awaiting the action of the court here in the General Land Office, and it is estimated that there are nearly three hundred more before the various townsite boards.

The case in the U. S. Supreme Court is No 1130, *Daniel J. McDaid et al., plaintiffs in error*, vs. *The Territory of Oklahoma on the relation of Winfield S. Smith et al.*

Very respectfully,

GEO. CHANDLER,
Acting Secretary.

O

Office Supreme Court U. S.
FILED.
OCT 9 1893
JAMES H. McKENNEY,
CLERK

CASE No. 15100.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

DANIEL J. McDAID, WILLIAM H. MERRIWEATHER, and JOHN H. SHANKLIN, plaintiffs in error,
vs.
THE TERRITORY OF OKLAHOMA ON THE relation of Winfield S. Smith and Stephen H. Bradley.
No. 785.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF FOR PLAINTIFFS IN ERROR.

CASE No. 15100.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

DANIEL J. McDAID, WILLIAM H. MERRIWEATHER, and JOHN H. SHANKLIN, plaintiffs in error,
vs.
THE TERRITORY OF OKLAHOMA ON THE relation of Winfield S. Smith and Stephen H. Bradley.
} No. 785.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

The plaintiffs in error are trustees of the town site of Guthrie, Okla., appointed by the Secretary of the Interior under the act of May 14, 1890 (c. 207, 26 Stat., 109), entitled "An act to provide for town-site entries of lands in the district known as Oklahoma, and for other purposes." The relators, Smith and Bradley, claim to have entered two lots in said town site on April 22, 1889. One John M Galloway claimed a prior right to the lots.

The relators, on September 23, 1890, applied to the town-site trustees for a deed of the lots, and on the same day Galloway filed his application for a deed for the same lots. The trustees heard the controversy of the two claimants. Galloway having died, his widow and heirs were substituted for him. On April 6, 1891, the trustees rendered their decision in favor of the relators, finding that they were entitled to the occupancy of the lots in dispute and to a conveyance from the trustees, and the trustees ordered that a deed be executed by them to the relators. Galloway's heirs filed their appeal from said decision to the Commissioner of the General Land Office. In consequence of the appeal the trustees refused to execute the deed which had been ordered, and thereupon the relators commenced this suit in mandamus in the district court of the Territory for the first judicial district to compel the trustees to execute and deliver a deed to them.

The complaint alleges that the sole ground of the trustees' refusal to execute the deed is the appeal taken by Galloway's heirs to the Commissioner of the General Land Office; that there is no authority for such appeal, and that the attempted appeal furnishes no excuse to the trustees for their refusal to execute a deed. The defendants answered, alleging as their ground for refusing to execute the deed, that Galloway's heirs—

> filed their appeal from the decision of this board to the Commissioner of the General Land Office pursuant to instructions under act of Congress under which this board was appointed, such instructions having been made by the Secretary of the Interior authorizing appeals by claimants to lots in cases where such claimants feel themselves aggrieved by the decisions of this board.

And these defendants, further answering, say that there is a right of appeal given by the instructions of the Secretary of the Interior and recognized by this board, and that appeals in similar cases have been taken by other persons from other decisions of this board both before and after the appeal taken in this case.

And these defendants say that they were appointed by the Secretary of the Interior, and that at the time of their appointment were directed to allow appeals from their decisions where such appeals were properly prayed, and that the decision [appeal] in this case was properly prayed and under such instructions was granted.

And these defendants further say that the question of the legal ownership as to said lot has not been definitely settled by the higher tribunals of the Interior Department, and that no deeds have passed for such lots, and should not pass until such appeal is disposed of, and that under such circumstances it is not for this court, by mandate or otherwise, to direct in what manner or to whom conveyances of lands or lots the title [to] which is in the United States should be conveyed to individuals. (Rec. pp. 5, 6.)

The relators demurred to the answer, and their demurrer was sustained. Thereupon the defendants moved to dismiss the cause upon the ground that the Territorial court had no jurisdiction of the subject-matter of the action. This motion was overruled, and judgment was entered ordering the trustees to execute and deliver a deed to the relators for the lots in question. The judgment of the district court was affirmed, on appeal, by the supreme court of the Territory. This is a writ of error, sued out by direction of the Secretary of the Interior, to reverse the judgment of the supreme court of the Territory.

ASSIGNMENT OF ERRORS.

1. The supreme court of the Territory of Oklahoma erred in affirming the judgment of the district court.

2. The district court erred (*a*) In holding that there was no right of appeal from the decision of the town-site trustees to the land office; (*b*) In holding that it had jurisdiction to compel the execution of a deed to the relators by this proceeding in mandamus.

The printed record does not show service of the citation, but the defendants in error entered their appearance at the last term to a motion to advance the case and consented to the present assignment. A copy of this motion and appearance is appended.

ARGUMENT.

I.

THE AUTHORITY CONFERRED UPON THE SECRETARY OF THE INTERIOR BY THE OKLAHOMA TOWN-SITE ACT, TO PROVIDE REGULATIONS FOR THE PROPER EXECUTION OF THE TRUST BY THE TOWN-SITE TRUSTEES, INCLUDES THE POWER TO PROVIDE FOR APPEALS FROM THE TRUSTEES TO THE LAND OFFICE.

The following is a copy of the act of Congress of May 14, 1890 (26 Stats., 109 c. 207), under which the plaintiffs in error were appointed town-site trustees; of section 2387 of Revised Statutes referred to in the first section of the act, and of sections 4, 5, 6, and 7 of the act of Kansas mentioned in section 5 of the act.

CHAP. 207.—AN ACT to provide for town-site entries of lands in what is known as "Oklahoma," and for other purposes.

Be it enacted, etc., That so much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by

actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees: *Provided*, That the Secretary of the Interior may, when practicable, cause more than one town site to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party.

SEC. 2. That in the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be prima facie evidence of the claim of occupancy of the holder: *Provided*, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States or the proclamation of the President thereunder: *Provided further*, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

SEC. 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved

survey within the limits of such town site, shall be conveyed to or in trust for the same.

SEC. 4. That all lots not disposed of as hereinbefore provided for shall be sold, under the direction of the Secretary of the Interior, for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

SEC. 5. That the provisions of sections four, five, six, and seven, of an act of the legislature of the State Kansas, entitled, "An act relating to town sites," approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

SEC. 6. That all entries of town sites now pending on application hereafter made under this act, shall have preference at the local land office of the ordinary business of the office, and shall be determined as speedily as possible, and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit, and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act, and upon the application of the trustees herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality, and when final entry is made the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

SEC. 7. That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act, shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized

for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed; and such traveling and other necessary expenses as the Secretary may authorize, and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

SEC. 8. That the sum of ten thousand dollars or so much thereof as may be necessary is hereby appropriated to carry into effect the provisions of this act, except that no portion of said sum shall be used in making payment for land entered hereunder, and the disbursements therefrom shall be refunded to the Treasury from the sums which may be realized from the assessments made to defray the expense of carrying out the provisions of this act.

Approved, May 14, 1890.

Revised Statutes, Sec. 2387. Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural preemption laws, it is lawful in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

SECTIONS FROM THE ACT OF KANSAS ENTITLED "AN ACT RELATING TO TOWN SITES."

SEC. 4. At any time after the entry of any such town site the probate judge of the county in which such town may be situated may appoint three commissioners, who shall not be residents of such town or the owners of any interest therein; and it shall be the duty of such commissioners to cause an actual survey of such site to be made, conforming, as near as may be, to the original survey of such town, designating on such plat the lots or squares on which improvements are standing,

with the name of the owner or owners thereof, together with the value of the same.

SEC. 5. Said commissioners shall, as soon as the survey and plat shall be completed, cause to be published, in some newspaper published in the county in which such town is situated, a notice that such survey has been completed, and giving notice to all persons concerned or interested in such town site that, on a designated day, the said commissioners will proceed to set off to the persons entitled to the same, according to their respective interests, the lots, squares, or grounds to which each of the occupants thereof shall be entitled. Such publication shall be made at least thirty days prior to the day set apart by such commissioners to make such division.

SEC. 6. After such publication shall have been duly made the commissioners shall proceed, on the day designated in such publication, to set apart to the persons entitled to receive the same, the lots, squares, or grounds to which each shall be entitled, according to their respective interests, including in the portion or portions set apart to each person or company of persons the improvements belonging to such persons or company.

SEC. 7. After the setting apart of such lots or grounds and the valuation of the same, as hereinbefore provided for, the said commissioners shall proceed to levy a tax on the lots and improvements thereon, according to their value, sufficient to raise a fund to reimburse to the parties who may have entered such site the sum or sums paid by them in securing the title to such site, together with all the expenses accruing in perfecting the same, the fees due the commissioners and the surveyor for their respective services, and other necessary expenses connected with the proceedings.

Approved March 2, 1868. General statutes of Kansas, 1868, pp. 1074, 1075.

The act of May 14, 1890, does not provide in terms for appeals from the town-site trustees to the Secretary of the Interior, but it directs (section 1) that "the Secretary of the Interior shall provide regulations for the proper execution of the trust by such trustees." And (section 7) "that the trustees * * * shall keep a record of their proceedings, which shall, with all papers filed with them,

and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same." The trustees are appointed by the Secretary of the Interior (section 1) and their compensation and traveling and other necessary expenses are fixed by him. (Section 7.)

These provisions, taken together, seem to indicate a clear intention on the part of Congress to place the trustees, and the execution of their trust, under the general supervision of the Department of the Interior.

Now, it is well settled that the supervisory power of the Secretary of the Interior over persons charged with the administration of the laws relating to the public lands may be exercised by direct orders or by review on appeal, and that express statutory authority for appeals is not necessary.

Magwire v. *Tyler*, 1 Black, 195.

Snyder v. *Sickles*, 98 U. S., 203.

Knight v. *United States Land Association*, 142 U. S., 161, 176–182.

The opinion of Mr. Justice Lamar in the latter case presents a complete review of the subject, as does that of Mr. Justice Clifford in *Snyder* v. *Sickles*.

We submit, therefore, that the general supervisory power of the Secretary of the Interior over the disposition of the public lands, in connection with the power expressly conferred by the act of may 14, 1890, to "provide regulations for the proper execution of the trust by such trustees," is ample warrant for the regulations which the Secretary prescribed for the trustees at bar, including the

regulation providing for appeals from them to the Commissioner of the General Land Office, and thence to the Secretary of the Interior. The regulation for appeals is set out in full in 13 L. D., 12.

This general supervisory power of the Secretary of the Interior and his right thereunder to entertain appeals was not denied by the court below. To use its own language, it recognized the authority of the Secretary of the Interior "to supervise all matters relating to the public lands, including appeals in all cases," but the court said that this power related "solely to public lands the title to which is still in the United States," and that "after patent issues, the title of the United States passes, and the Executive Departments and the land officers lose all control over the lands embraced in the patent." (Opinion, Record, 16.)

The court further said (Opinion, Record 17, 18):

> The town-site act in question specifically provides that when the trustees shall make entry of any lands for town-site purposes the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses as provided in the act. This conveyance was made by patent, the Government received the purchase money for the land, delivered the patent, and parted with all control over the title. The trustees held the title in trust for the legal occupants of the several lots, and it was their duty to determine under the law and the regulations prescribed by the Secretary who the legal occupants were at the date of their entry, and, when they had so determined, to convey the legal title to such person.

In other words, the decision of the supreme court of the Territory proceeds upon the ground that the title of the Government passed upon the execution of the President's patent to the trustees, and that they held the title thereafter in trust for the occupants, free from the control

of the Land Department. We think that this is a mistaken view of the act and of the purposes of the President's deed to the trustees. It is true that the act (section 6) declares that—"When final entry is made the title of the United States to the land covered by such entry shall be conveyed to said trustees." But the conveyance so to be made is declared by the act to be "for the uses and purposes herein provided."

Chief of these uses, and of the duties cast upon the trustees by the act, is the determination of the rights of contesting claimants. Those rights are not to be enforced, as in the case of ordinary trusts, by suits in the courts against the town-site trustees, but are to be determined by the trustees themselves, acting as the representatives of the Land Department. This is evident from several provisions.

Section 7 of the act provides—

> That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act, shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same.

Section 2 provides—

> That in the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be prima facie evidence of the claim of occupancy of the holder. * * *

The title to the entire town site was conveyed in the first instance to the trustees, not for the purpose of divesting the Government of its control, but to enable the Government the more conveniently to maintain and exercise its control over the final disposition of the lands through officers appointed by the head of the Land Department, acting under regulations prescribed by him.

That the deed to the trustees was not intended to divest the Government of its title and interest, much less of its control over the final disposition of the land, is further evident from the provisions of section 4, which directs—

> That all lots not disposed of as hereinbefore provided for shall be sold *under the direction of the Secretary of the Interior* for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use, as sites for public buildings, or for the purpose of parks, *if in the judgment of the Secretary* such reservation would be for the public interest, and *the Secretary shall execute proper conveyances* to carry out the provisions of this section.

If the title of the Government had been completely divested, no interest would remain to be sold under the direction of the Secretary of the Interior or to be appropriated by him to public uses, and it would be futile to provide for conveyances to be executed by him to carry out the provisions of the section.

The putting of title into the trustees under the Oklahoma act was manifestly to serve the convenience of occupants and to enable them to get their deeds at home and more promptly and at less trouble and expense than if they were obliged to apply to the Land Department at Washington. But it was no part of the scheme to divest the Government of its control over the final disposition

of the lands. That was lodged securely in trustees appointed by the Secretary of the Interior to represent the Government, with the direction that the Secretary should "provide regulations for the proper execution of the trust by such trustees."

In this respect the Oklahoma town-site act differs from ordinary town-site trusts created under the Revised Statutes, section 2387, which directs the execution of town-site trusts under that section "as to the disposal of lots in such town, and the proceeds of the sale thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

In *Moore* v. *Robbins* (96 U. S., 530), relied upon in the court below, Moore had bought certain Government lands at a public sale held by the officers of the land district. His right was contested before the register and receiver by one Bunn, who set up a prior preëmption right. Those officers decided in favor of Bunn, whereupon Moore appealed to the Commissioner of the General Land Office, who reversed the decision of the register and receiver, and upon this decision a patent was issued to Moore, who went into possession and remained in possession. Sometime after the patent was delivered to Moore, Bunn appealed from the Commissioner to the Secretary of the Interior, who reversed the Commissioner's decision and affirmed that of the register and receiver, and directed the patent of the Commissioner to be recalled and one to be issued to Bunn. But Moore refused to return his patent, and the Land Department did not venture to issue another for

the same land. It was upon this state of facts, which I have recited almost in the language of Mr. Justice Miller, that the learned justice said (page 531):

> So there is no question but that Moore is now vested with the legal title to the land, and was long before this suit was commenced. Nor is there, in looking at the testimony taken before the register and receiver and that taken in the present suit, any just foundation for Bunn's preëmption claim.

And it was with reference to the title so conferred by the Government, not in trust to anyone, but directly and finally to Moore by the President's patent, that the language quoted in the opinion of the court below was used by Mr. Justice Miller. Neither that language nor the case has any bearing upon the question at bar, which is whether the title conveyed by the President's patent to the Oklahoma trustees was granted for the purpose of putting title into the trustees as officers of the Government for the execution of the trust devolved upon them as such, or whether it was granted for the purpose of divesting the Government of all authority and control over the final disposition of the property.

We submit, to use the language of Judge Clark in his dissenting opinion in the court below:

> That the only correct position is that the trustees are merely agents of the Government for the purpose of divesting it of its title to these small subdivisions of the public lands. * * *
>
> The patent is conditional and made, it seems to me, to officers of the Government for the benefit of the occupants, but in determining the beneficiaries the claimant has a right to the decision of the Secretary of the Interior and has the right to appeal to him.

The question of the right of appeal involved in this case is discussed at length by Secretary Noble (13 L. D., 9) and by Assistant-Secretary Chandler (14 L. D., 295).

II.

OBJECTIONS TO THE JURISDICTION OF THE COURT BELOW TO AWARD A WRIT OF MANDAMUS.

If this court is of opinion that the regulation prescribed by the Secretary of the Interior, allowing appeals from the decisions of the town-site trustees to the land office, is without authority of law, several objections remain to be considered to the jurisdiction of the district court of the Territory of Oklahoma to award the writ of mandamus.

1. In the first place, if the view of the court below is correct, that the title and control of the Government was wholly divested by the deed made to the trustees, and that the trustees held the title thereafter, as ordinary trustees, in trust for the occupants, it would seem that the right of an occupant to a deed could not be enforced by mandamus, but only by a bill in equity.

2. The courts of the Territory of Oklahoma are established under section 9 of the act of May 2, 1890, chapter 182 (26 Stats., 81–86). That act provides that—

> Each of the said district courts shall have and exercise, exclusive of any court heretofore established, the *same* jurisdiction in all cases arising under the Constitution and laws of the United States *as is vested in the circuit and district courts of the United States.*

While the act also confers upon the supreme and district courts of the Territory and the respective judges thereof, authority to grant writs of mandamus and habeas corpus in all cases authorized by law, the power to grant the writ at bar, which was to enforce a right arising, if at all, under the laws of the United States, must be derived from the clause first quoted, and is, therefore, limited by the jurisdiction of the circuit and district courts of the United States in such cases.

But the circuit and district courts of the United States have no power to issue a writ of mandamus, except when necessary for and ancillary to their jurisdiction in another matter. They can not issue the writ against an officer of the United States.

McIntire v. *Wood*, 7 Cranch, 504 (1813).

McClung v. *Silliman*, 6 Wheat., 598–604.

The Secretary v. *McGarrahan* (9 Wall., 298, 311).

In the latter case Mr. Justice Clifford said, page 311:

> Since the decision of this court in the case of *McIntire* v. *Wood*, it has been regarded as the settled law of the court that the circuit courts of the United States in the several States, do not possess the power to issue writs of mandamus except in cases in which it may be necessary to the exercise of their jurisdiction.

We submit, therefore, that the district court of the Territory did not have jurisdiction to entertain this proceeding or to award the writ.

It is also to be observed that, under the act organizing the court, cases arising under the Constitution and laws of the United States are to be determined by the court sitting, not as a Territorial court, but as a court of the United States.

The judgment brought in review was rendered by the court sitting as a Territorial court, and would seem for that reason to be erroneous, if not void. The case of Gon-shay-ee, petitioner (130 U. S., 343), presents the converse of the proposition involved. Gon-shay-ee was convicted in a district court of the Territory of Arizona, sitting as and exercising the functions of a circuit court of the United States, under Revised Statutes, section 1910, which is similar to the special clause first above quoted from the act organizing the courts of Oklahoma. This court released him on habeas corpus, holding that his offence arose under the laws of the Territory, and that he could therefore be tried only on the Territorial side of the court. Conversely the right sought to be enforced at bar arises, if at all, under the laws of the United States, and can not be enforced on the Territorial side of the court.

3. If this proceeding in mandamus lies at all, it is only at the suit of the United States. The town-site trustees were appointed under the laws of the United States by the Secretary of the Interior. Their action as officers of the United States can not be controlled at the suit of the Territory of Oklahoma. (*Territory* v. *Lockwood*, 3 Wall., 236.)

LAWRENCE MAXWELL, JR.,
Solicitor-General.

UNITED STATES OF AMERICA.

In the Supreme Court of the United States.

DANIEL J. McDAID, JOHN G. SHANKLIN, and WILLIAM H. Merriweather, townsite trustees of Guthrie, appellants,
vs.
STEPHEN H. BRADLEY AND WINFIELD S. Smith, appellees.

The appellees, Bradley and Smith, are hereby notified that the Attorney-General of the United States will, on the 24th day of April, 1893, in the Supreme Court of the United States, move that the above-named case shall be advanced on the docket for an early hearing at the October term, 1893, of said court, and said appellees are notified that if they wish to resist said motion to be in the Supreme Court of the United States at 12 o'clock noon of the said 24th day of April, 1893, for that purpose.

Dated this 24th day of April, 1893.

RICHARD OLNEY,
Attorney-General of the United States,
By HORACE SPEED,
U. S. Atty., of Counsel for said Appellants.

Service of this notice is acknowledged and consent given that the case above-named may be set for an early hearing at the next term of said court.

Dated this 24th day of April, 1893.

HARPER S. CUNNINGHAM,
Of Counsel for Appellees.